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No. 85-1772

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1985

THE STATE OF UTAH, by and through its
DIVISION OF STATE LANDS,
Petitioner,

v.

UNITED STATES OF AMERICA; DONALD P. HODEL,
Secretary of the Interior;
ROBERT F. BURFORD, Director of the Bureau
of Land Management within the Department of the Interior;
and ROLAND G. ROBISON, JR., Utah State Director
of the Bureau of Land Management,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF OF THE STATES OF ALASKA, ALABAMA, ARIZONA, ARKANSAS, CALIFORNIA, COLORADO, FLORIDA, GEORGIA, HAWAII, IDAHO, ILLINOIS, INDIANA, KANSAS, LOUISIANA, MASSACHUSETTS, MISSISSIPPI, MISSOURI, MONTANA, NEVADA, NEW HAMPSHIRE, NEW MEXICO, NORTH CAROLINA, NORTH DAKOTA, OKLAHOMA, OREGON, TEXAS, WASHINGTON, WEST VIRGINIA, WISCONSIN, AND WYOMING AS AMICI CURIAE IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a pre-statehood federal withdrawal can defeat a state's sovereign ownership of lands underlying navigable waters under the equal footing doctrine.

TABLE OF CONTENTS

	Page
Question presented	i
Interest of amici curiae	1
Question presented	4
Reasons for granting the writ	4
I	
The decision below conflicts with prior rulings of this court	5
II	
The importance of the sovereign rights at issue warrants review	9
Conclusion	12

TABLE OF AUTHORITIES CITED

Cases

	Page
Alaska v. United States, Nos. A 83-343, A 84-435 and A 86-181 (Consolidated) (D. Alaska, filed July 5, 1983, October 11, 1984 and March 27, 1986)	10
Alaska v. United States, No. A 86-110 (D. Alaska, filed February 21, 1986)	10
Appeal of Cook Inlet Region, Inc., No. 84-149 (Interior Board of Land Appeals, filed November 5, 1983)	11
Choctaw Nation v. Oklahoma, 397 U.S. 620 (1970)	2, 6
Coyle v. Smith, 221 U.S. 559 (1911)	11
Illinois Central Railroad Company v. Illinois, 146 U.S. 387 (1892)	10
Kaiser Aetna v. United States, 440 U.S. 164 (1979)	7
Martin v. Waddell, 41 U.S. (16 Pet.) 367 (1842)	5
Minnesota ex rel. Alexander v. Block, 660 F.2d 1240 (8th Cir. 1981), cert. denied, 455 U.S. 1007 (1982)	8
Montana v. United States, 450 U.S. 544 (1981)	2, 6
Mumford v. Wardwell, 73 U.S. (6 Wall.) 423 (1867)	5
Oregon ex rel. State Land Board v. Corvallis Sand & Gravel Co., 429 U.S. 363 (1977)	6, 8, 10
Ounalashka Corp. v. Alaska, No. 77-918 (Alaska Superior Court, filed January 31, 1977)	10, 11
Pollard's Lessee v. Hagan, 44 U.S. (3 How.) 212 (1845)	5, 9, 11
Shively v. Bowlby, 152 U.S. 1 (1894)	5
State of Alaska, No. 85-768 (Interior Board of Land Appeals, filed July 10, 1985)	11
United States v. California, 342 U.S. 19 (1947)	7
United States v. California, 436 U.S. 32 (1978)	6, 8
United States v. Louisiana, 363 U.S. 1 (1960)	7

TABLE OF AUTHORITIES CITED

CASES

	Page
United States v. Oregon, 295 U.S. 1 (1935)	5, 8
United States v. Utah, 283 U.S. 64 (1930)	7
U.S. Constitution	
Commerce Clause, article I, section 8, cl. 3	8
Property Clause: article IV, section 3, cl. 1	11
article IV, section 3, cl. 2	8
Other Authorities	
Submerged Land Act, 43 U.S.C. §§ 1301, et seq.	6
H. Rep. No. 624, 85th Cong., 1st Sess. 6 (1957)	8
Public Land Law Review Commission, *One-Third of the Nation's Land* (1970), 43	3
Sol. Op. M-36911, 86 I.D. 151 (1978)	3

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INTEREST OF AMICI CURIAE

There are many navigable rivers and lakes within the boundaries of the states appearing as *amici curiae*. For more than 140 years, this Court consistently has held that title to the lands under these navigable waterbodies is an incident of sovereignty reserved

to the states, subject only to the powers surrendered to the national government in the Constitution. This sovereign ownership vested in the original 13 states as direct successors to the English crown, and was retained by them when they formed the Union. Because the Constitution requires that all states are equal with respect to sovereignty, the United States holds such lands in territories in trust for future states, and title passes from the federal government to new states when they join the Union and assume sovereignty on an "equal footing" with previously-admitted states.[1]

The only exception to this equal footing doctrine which this Court has recognized is the rare situation where title to lands underlying navigable waters was conveyed to a third party prior to statehood.[2] In this case, the Court of Appeals for the Tenth Circuit created a new exception, holding that the pre-statehood federal designation of Utah Lake as a potential reservoir site, as distinct from a pre-statehood conveyance to a third party, defeated Utah's sovereign title to the lakebed under the constitutional equal footing doctrine.

This ruling, unsupported in this Court's prior decisions, diminishes Utah's sovereignty and places Utah on a less-than-equal footing with respect to the original 13 states. Since the equal footing doctrine requires that *amici* states' sovereignty is equal to Utah's, their sovereignty also will be diminished if this decision is permitted to stand. If not reversed, the decision will alter the fundamental relationship between the states and the federal government by elevating federal executive action above the constitutional sovereign rights of the several states.

The Court of Appeals' decision will have significant practical consequences as well. The excessive use of federal withdrawal

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[1] *See generally* Montana v. United States, 450 U.S. 544, 551-552 (1981), and cases cited.

[2] *E.g.*, Choctaw Nation v. Oklahoma, 397 U.S. 620 (1970) (characterized in *Montana* as "a singular exception" to the otherwise "established line of cases," 450 U.S. at 555 n.5, holding that title to submerged lands vests in the states at statehood).

authority is generally recognized.[3] Many navigable waterbodies in *amici* states lie within the exterior boundaries of pre-statehood federal withdrawals and reservations[4] similar to the pre-statehood federal designation of Utah Lake as a potential reservior site. The lower court's ruling may have a direct effect on *amici* states' sovereign ownership of lands under navigable waterbodies which lie within the exterior boundaries of pre-statehood federal withdrawals.

These states' concern is not a hypothetical one. The mere existence of a withdrawal on the date of statehood, even when revoked shortly thereafter, has served as the basis of a federal claim that a state's equal footing rights have been defeated.[5] The

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[3] The Public Land Law Review commission stated:

> Concern about problems associated with the "withdrawal" and "reservation" of public domain lands was strongly voiced in the deliberations which led to the creation of the Commission, and was a recurring subject of complaint in the Commission's public meetings. *The contractor's study of withdrawals indicates that they have been used by the Executive in an uncontrolled and haphazard manner.*
>
> . . .
>
> *. . . In short, the excessive use of Executive withdrawals has become a source of increasing controversy.*

Public Land Law Review Commission, *One-Third of the Nation's Land* (1970) at 43-44 (footnote omitted; emphasis added).

[4] A "withdrawal" of public lands removes them from settlement, sale or entry under some or all of the public land laws. A "reservation" dedicates them for some specific purpose. *See* Public Land Law Review Commission, *One Third of the Nation's Land* (1970) at 43 n.1.

[5] The most egregious example may be Sol. Op. M-36911, 86 I.D. 151 (1978), which concluded that a 1943 withdrawal of 48.8 million acres, constituting all of Alaska's North Slope, and a reservation of the minerals therein "for use in connection with the prosecution of [World War II]" totally defeated Alaska's title to the beds of all navigable waters in the lands withdrawn and that title to the beds remained with the federal government, notwithstanding the end of the war in 1945, Alaska's admission to the Union in 1959 and revocation of the withdrawal in 1960.

Court of Appeals' decision, if permitted to stand, will only encourage further federal assaults on state sovereignty and the several states' sovereign title to the beds of navigable waterbodies within the exterior boundaries of pre-statehood federal withdrawals.

This case presents a basic question concerning the relationship between the inherent sovereign rights of the several states and the powers surrendered to the national government in the Constitution. For these reasons, *amici* states believe that the case should be reviewed by this Court.

QUESTION PRESENTED

Although the Court of Appeals' decision presents specific questions relating to the federal withdrawal of Utah Lake as a potential reservoir site,[6] the *amici* brief is limited to the following question: whether a pre-statehood federal withdrawal can defeat a state's sovereign ownership of lands underlying navigable waters under the equal footing doctrine.

REASONS FOR GRANTING THE WRIT

The *amici* states urge this Court to review the Court of Appeals' decision because the decision (1) conflicts with this Court's decisions relating to the equal footing doctrine and submerged land ownership, and (2) is an unwarranted and unnecessary diminishment of state sovereignty presenting a fundamental question regarding the balance between the states' sovereign rights and those surrendered to the federal government. The significance of the lower court's error, together with the importance of the sovereign rights at issue and the direct and potential effect of the decision, merit the exercise of this Court's certiorari jurisdiction.

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[6] *Amici* states agree with Utah that the questions relating to the specific withdrawal of Utah Lake as a potential reservoir site independently merit this Court's review.

I

THE DECISION BELOW CONFLICTS WITH PRIOR RULINGS OF THIS COURT

This Court repeatedly has recognized that the several states own the beds of navigable waterbodies as an inherent attribute of state sovereignty. The original 13 states own the lands underlying navigable waters within their boundaries as the sovereign successors to the English crown. *Martin v. Waddell*, 41 U.S. (16 Pet.) 367 (1842). All subsequently-admitted states enter the Union on an equal footing with the original 13 states, and accordingly must hold the same title to the lands underlying navigable waters within their respective boundaries. *Pollard's Lessee v. Hagan*, 44 U.S. (3 How.) 212 (1845). Under this equal footing doctrine, "the new states since admitted have the same rights, sovereignty and jurisdiction . . . as the original states possess within their respective borders." *Mumford v. Wardwell*, 73 U.S. (6 Wall.) 423, 436 (1867).

To implement the equal footing doctrine of *Pollard's Lessee*, the United States holds such lands in a territory "in trust for the several States to be ultimately created out of the territory." *Shively v. Bowlby*, 152 U.S. 1, 57 (1894). "[U]pon the admission of a state to the Union, the title of the United States to lands underlying navigable waters within the state passes to it, as incident to the transfer to the state of local sovereignty, and is subject only to the paramount power of the United States to control such waters for the purposes of navigation in interstate and foreign commerce." *United States v. Oregon*, 295 U.S. 1, 14 (1935). The transfer of title from the United States, as trustee for the new state, to the new state is a matter of constitutional law, not federal grace:

> Thus under *Pollard's Lessee* the State's title to lands underlying navigable waters within its boundaries is confirmed not by Congress but by the Constitution itself. The rule laid down in *Pollard's Lessee* has been followed in an unbroken line of cases which make it clear that the title thus acquired by the state is absolute so far as any federal principle of land titles is concerned.

Oregon ex rel. State Land Board v. Corvallis Sand & Gravel Co., 429 U.S. 363, 374 (1977).

At the same time, this Court has recognized that the United States may defeat a state's title to lands underlying navigable waters by conveying them to a third party prior to statehood. However, such conveyances will be found only in extraordinary circumstances:

> But because control over the property underlying navigable waters is so strongly identified with the sovereign power of government, it will not be held that the United States has conveyed such land except because of "some international duty or public exigency." A court deciding a question of title to the bed of a navigable water must, therefore, begin with a strong presumption against conveyance by the United States, and must not infer such a conveyance "unless the intention was definitely declared or otherwise made plain," or was rendered "in clear and especial words," or "unless the claim confirmed in terms embraces the land under the waters of the stream."

Montana, 450 U.S. at 552 (citations and footnote omitted). Indeed, such pre-statehood conveyances are so rare that *Choctaw Nation v. Oklahoma*, 397 U.S. 620 (1970), holding that the bed of the Arkansas River was conveyed to three Indian tribes prior to Oklahoma's admission to the Union and therefore Oklahoma's title was defeated, is "a singular exception" to the otherwise "established line of cases" holding that title to submerged lands vests in the states at statehood. *Montana*, 450 U.S. at 555 n.5.

This Court has never held, or even intimated, that a federal withdrawal of submerged lands underlying navigable waters—as opposed to a conveyance to a third party—will defeat a state's title under the equal footing doctrine. Indeed, this Court has held that a federal withdrawal of submerged lands, prior to enactment of the Submerged Lands Act, 43 U.S.C. § 1301 et seq., did *not* defeat a state's title to those lands under the Act. *United States v. California*, 436 U.S. 32 (1978).

The submerged lands at issue in that case constituted part of the territorial sea, and therefore were not subject to the constitutional equal footing doctrine. *See United States v. California*, 342 U.S. 19 (1947). However, "[t]he very purpose of the Submerged Lands Act was to undo the effect of [the 1947 *California* decision],"[7] 436 U.S., at 37, and extend the principles of the equal footing doctrine to the submerged lands underlying the territorial sea. *United States v. Louisiana*, 363 U.S. 1, 16-24 (1960). The Court of Appeals' decision here is in conflict with this Court's determination that a pre-Submerged Lands Act federal withdrawal (like the 1889 designation of Utah Lake as a potential reservoir site) cannot defeat a state's title under that Act. More significantly, if a pre-Submerged Lands Act withdrawal has no effect on a state's statutory title, *a fortiori* a pre-statehood withdrawal cannot defeat a state's constitutional sovereign title under the equal footing doctrine.

The lower court's major error was in treating a pre-statehood federal withdrawal as tantamount to a pre-statehood conveyance to a third party. *See* 780 F.2d at 1518 (Petitioner's Appendix ("Pet. App.") at 8a-9a). The distinction between a pre-statehood conveyance of submerged lands by the United States to a third party and a pre-statehood federal withdrawal is a substantive one. *Cf. United States v. Utah*, 283 U.S. 64, 88 (1930) ("earlier Executive Order did not constitute a grant"). Where the United States has conveyed the submerged lands to a third party prior to statehood, sovereignty and ownership have been severed. Following such a conveyance, the entire "bundle of rights that are commonly characterized as property"[8] has been transferred to a third party. No attributes or aspects of ownership remain linked to sovereignty, and none of those rights remain to be transferred to the new state.

In the case of a pre-statehood federal withdrawal, however, the United States has not conveyed the lands to a third party. Instead, it has merely withdrawn them from the operation of the public

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[7] After all, prior to the 1947 *California* decision, the lands underlying the territorial sea were "assumed by many, and not without reason," to fall within the equal footing doctrine. United States v. Louisiana, 363 U.S. 1, 16 (1960).

[8] Kaiser Aetna v. United States, 440 U.S. 164, 176 (1979).

land laws. Even when reserved for a specific purpose, the federal government's title to those lands is not enhanced. *Cf. California*, 436 U.S. at [illegible] ("A reservation under the Antiquities Act thus means no more than that the land is shifted from one federal use, and perhaps from one federal managing agency, to another") (footnote omitted). Since the lands are still in federal ownership, they remain subject to the constitutional trust in favor of future states.

There is no reason to conclude, as the Court of Appeals apparently did, that a transfer of title under the equal footing doctrine and a pre-statehood federal withdrawal are wholly incompatible and the lands either pass to the state or remain irrevocably in federal ownership. The better analysis, one which harmonizes the states' constitutional right to be admitted to the Union on an equal footing and the federal government's ability to discharge its constitutional duties, is that title to the lands vests in the states at statehood, subject only to those rights surrendered to the national government in the Constitution.[9] The Court of Appeals' analysis, on the other hand, makes newly-admitted states' sovereign title hinge on whether they were admitted before or after a federal withdrawal. It would be "a perverse application of the equal-footing doctrine" if state sovereign rights depend on the date of a state's admission.[10] *Oregon ex rel. State Land Board v. Corvallis Sand & Gravel Co.*, 429 U.S. at 378.

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[9] These clearly include "the paramount power of the United States to control such water for purposes of navigation in interstate and foreign commerce" under the Commerce Clause, article I, section 8, cl. 3, United States v. Oregon, 295 U.S. at 14, and possibly the Property Clause, article IV, section 3, cl. 2. E.g., Minnesota ex rel. Alexander v. Block, 660 F.2d 1240 (8th Cir. 1981), cert. denied 455 U.S. 1007 (1982) (under Property Clause, United States can regulate use of state-owned submerged lands and waters in Boundary Waters Canoe Area).

[10] Such a result would subject a newly-admitted state to the particular federal executive policy in effect at the time of admission. For example, "95 million acres—more than one-fourth of the total area of Alaska—[was] enclosed within various types of Federal withdrawals and reservations" at the time Alaska was admitted to the Union. H. Rep. No. 624, 85th Cong., 1st Sess. 6 (1957). This federal practice, widespread throughout many of the more-recently admitted states, had "been carried to extreme lengths in Alaska" such that many withdrawals were "either excessive in size or totally unnecessary." *Id.* at 6-7.

In summary, the principles underlying the equal footing doctrine require that a clear distinction be drawn between pre-statehood conveyances to third parties and pre-statehood federal withdrawals. The Court of Appeals failed to make that distinction, and its decision cannot stand in the face of this Court's prior decisions.

II

THE IMPORTANCE OF THE SOVEREIGN RIGHTS AT ISSUE WARRANTS REVIEW

In the seminal equal footing doctrine case, this Court recognized that federal ownership of lands underlying navigable waters poses a serious threat to state sovereignty while state ownership poses no threat to federal interests:

> To give to the United States the right to transfer to a citizen the title to the shores and the soils under the navigable waters, would be placing in their hands a weapon which might be wielded greatly to the injury of State sovereignty, and deprive the States of the power to exercise a numerous and important class of police powers. But in the hands of the States this power can never be used so as to affect the exercise of any national right of eminent domain or jurisdiction with which the United States have been invested by the Constitution. For [state sovereignty is] but municipal power, subject to the Constitution of the United states, "and the laws which shall be made in pursuance thereof."

Pollard's Lessee, 44 U.S. at 230.

The "injury" that state sovereignty might suffer from the wielding of this "weapon" by the United States goes well beyond a mere infringement of a proprietary interest. A state's sovereign title to the lands underlying navigable waters is much more than a simple property right:

> [I]t is a title different in character from that which the State holds in lands intended for sale. It is different from the title which the United States hold in the public lands which are open to pre-emption and sale. It is a title held in trust for the people of the State that they may enjoy the navigation of the waters, carry on commerce over them, and have liberty of fishing therein freed from the obstruction or interference of private parties. . . . The trust devolving upon the State for the public, and which can only be discharged by the management and control of property in which the public has an interest, cannot be relinquished by a transfer of the property.

Illinois Central Railroad Company v. Illinois, 146 U.S. 387, 452 (1892). This Court's comment in *Oregon ex rel. State Land Board v. Corvallis Sand & Gravel Co.*, 429 U.S. at 381, applies equally to this case: "Here, however, we are not dealing with substantive property law as such, but rather with an issue substantially related to the constitutional sovereignty of the States." Indeed, a new state's sovereign ownership of lands underlying navigable waters is "an inseparable attribute of the equal sovereignty guaranteed to it upon admission." *Louisiana*, 363 U.S. at 16 (citiation omitted).

The instant case was prompted by the United States' recent attempts to transfer interests in the bed of Utah Lake to third parties: "The controversy that gave rise to this litigation occurred in the autumn of 1976 when the Bureau of Land Management of the Department of Interior began to issue oil and gas leases on the bed of Utah Lake—an Act that the State viewed as a violation of its ownership and property rights to the bed of Utah Lake." 780 F.2d at 1516 (Pet. App. at 2a) (footnote omitted). Similar efforts by the United States to convey lands underlying navigable waters within the boundaries of pre-statehood federal withdrawals to third parties have prompted similar cases elsewhere.[11]

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[11] Attempts by the United States to transfer submerged lands to third parties in reliance on a pre-statehood federal withdrawal are at issue in Alaska v. United States, Nos. A 83-343, A 84-435 and A 86-181 (Consolidated) (D. Alaska, filed July 5, 1983, October 11, 1984 and March 27, 1986 respectively), Alaska v. United States, No. A 86-110 (D. Alaska, filed February 21, 1986), Ounalashka Corp. v. Alaska, No. 77-918 (Alaska Superior Court, filed January 31, 1977), Appeal of Cook Inlet Region, Inc., No. 84-149 (Interior Board of Land Appeals, filed November 5, 1983), and Appeal of State of Alaska, No. 85-768 (Interior Board of Land Appeals, filed July 10, 1985). The United States also is asserting that a pre-statehood federal withdrawal defeated sovereign state title under the equal footing doctrine in United States v. Alaska, No. 84 Original in this Court. However, it has not yet attempted to transfer title to those lands to third parties.

Through this means, the United States threatens to erode state sovereignty and upset the delicate balance between the inherent sovereign rights of states and the powers surrendered to the national government in the Constitution. While *Pollard's Lessee* applied the equal footing doctrine only in the context of title to the beds of navigable waterbodies, it has since been employed by this Court to limit even Congress' contitutional power to impose conditions on the admission of new states into the Union:[12] "The plain deduction from [*Pollard's Lessee*] is that when a new state is admitted into the Union, it is so admitted with all of the powers of sovereignty and jurisdiction which pertain to the original states, and that such powers may not be constitutionally diminished, impaired, or shorn away by any conditions, compacts, or stipulations embraced in the act under which the new state came into the Union, which would not be valid and effectual if the subject of Congressional legislation after admission." *Coyle v. Smith*, 221 U.S. 559, 573 (1911). The equal footing doctrine in the title navigability context is thus a cornerstone of the broader proposition, at the heart of our federal system, that all states are "equal in power, dignity and authority." *Id.* at 567.

Under the Court of Appeals' decision, however, Utah is denied the benefit of this basic principle because of pre-statehood federal executive action, an analysis which could easily be applied to other states in other contexts. This potential for altering the fundamental relationship between the states and the federal government is the reason several of the 30 *amici* states, including four of the original thirteen (Georgia, Massachusetts, New Hampshire and North Caolina), have joined in urging this Court

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[12] Article IV, § 3, cl. 1 provides: "New States may be admitted by the Congress into this Union; . . ."

to grant Utah's petition, even though the specific question presented—the effect of a pre-statehood federal withdrawal—has no direct application to them. The importance of the sovereign rights at issue, extending well beyond the merits of the instant case, warrants review by this Court.

CONCLUSION

The Court of Appeals' decision here is an unwarranted and unnecessary diminishment of state sovereignty under the equal footing doctrine. It is not supported by any of this Court's decisions and is in direct conflict with this Court's only decisions addressing a federal withdrawal of submerged lands. Because this case presents a very basic question concerning the power of the federal government to defeat sovereign state rights under the equal footing doctrine, the Court should grant Utah's petition for certiorari.

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Respectfully submitted,

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